

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

INDECK KEYSTONE ENERGY LLC, )  
Plaintiff, )  
vs. ) Case Number:  
VICTORY ENERGY OPERATIONS LLC, ) 04-325  
Defendant. )  
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The Deposition of PAUL A. KEMPF, P.E.

Date: Tuesday, November 1, 2005

Time: 1:37 p.m.

Place: Boveri, Murphy, Rice & LaDue  
400 Plaza Building  
210 South Michigan Street  
South Bend, Indiana

Called as a witness by the Defendant in  
accordance with the Federal Rules of Civil  
Procedure and Rules of the United States  
District Court for the Western District of  
Pennsylvania, pursuant to Notice.

Before Melody M. Goodrich, CM  
Notary Public, Cass County, Michigan

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Cassopolis, Michigan 49031-0338  
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1 conversation about everybody else in the industry.  
 2 I was -- it was some of the most unprofessional  
 3 discussions you'll ever have. All you had to do  
 4 was say, well, what do you think of your  
 5 competition, and you got an hour dissertation.  
 6 Q To the best of your recollection, did Mr. Cole  
 7 discuss any of Indeck's competitors in that first  
 8 meeting?  
 9 A I'm not sure we had that -- those discussions at  
 10 that point.  
 11 Q Okay. When was the next time that you met with or  
 12 spoke to Mr. Cole?  
 13 A Probably periodically. Off and on he would call,  
 14 as would everyone else, to follow up on the bidding  
 15 process and -- and our decision-making.  
 16 Q Do you recall any specific follow-up conversation  
 17 with Mr. Cole from the time that you first met with  
 18 him, until the time that Indeck was eliminated as a  
 19 bidder for -- for boiler number 6?  
 20 A I don't.  
 21 Q Did he visit you at Notre Dame at any point during  
 22 that period of time, or was it all telephonic?  
 23 A Mostly telephone. He may have stopped by one other  
 24 time. I don't absolutely remember.  
 25 Q Do you have any clear recollection, during any of

1 those conversations with Mr. Cole, from the first  
 2 meeting until Indeck was eliminated as a bidder, of  
 3 any instance where Mr. Cole discussed any of  
 4 Indeck's competitors?  
 5 A Well, we have to define for me what -- the point  
 6 when they were eliminated as a bidder.  
 7 Q And I think that's a fair statement, and I  
 8 appreciate you helping me out with that.  
 9 I would say at the time that the bid process  
 10 was reduced to the three finalists, subject to the  
 11 possibility of others coming back in if these three  
 12 didn't work out. Using that as a time reference.  
 13 A I'm sure we had some conversation because one of  
 14 the general -- just a general question we -- again,  
 15 I don't remember if it was in here or not. Give me  
 16 a second.  
 17 Actually, it's probably the kind of question  
 18 you don't typically write down and send somebody,  
 19 but on our list of questions that we -- you know,  
 20 we give you a list of questions for your meeting,  
 21 and we'd have other questions we were going to see  
 22 how you handled off-the-cuff.  
 23 And I know one of the standard questions was,  
 24 you know, how do you feel like you stack up against  
 25 your competition. We'd open that door and see who

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1 walked through it and what they would say.  
 2 I'm sure we had at least one of those  
 3 conversations with -- with him, and we had those  
 4 conversations with everyone at some point prior to  
 5 the meetings in August.  
 6 Q Okay. Do you recall any statements that Mr. Cole  
 7 made prior to the meetings in August regarding  
 8 Indeck's competition?  
 9 A There was a general mistrust from all of them  
 10 focused at the English Boiler proposal. Actually,  
 11 if you were going to buy a boiler based on what the  
 12 competitors said, you wouldn't buy anybody's boiler  
 13 because they all told you how none of the other  
 14 ones were any good.  
 15 Q I understand. I understand.  
 16 A Made that a difficult process.  
 17 Q I understand. But what I'm interested in is rather  
 18 than a general specific relating to Mr. Cole, do  
 19 you recall any specific comments that Mr. Cole made  
 20 regarding Indeck's competition between the first  
 21 conversation and that third week of July?  
 22 A To the best of my recollection, his comments were,  
 23 again, like most others. The English boiler was a  
 24 unique design, a patented design that they had and,  
 25 therefore, it seemed to draw the most fire from

1 everybody. If you're going to complain, complain  
 2 about something you can't provide.  
 3 But I don't have an absolute memory of what he  
 4 would have said. I just heard that from everybody.  
 5 Q Do you recall any conversations specifically with  
 6 Mr. Cole after the third week of July, when the  
 7 university reduced the number of active negotiators  
 8 that it was dealing with down to three?  
 9 A Yes.  
 10 Q Okay. How many specific conversations do you  
 11 recall with Mr. Cole after the third week of July?  
 12 A One very specifically in the middle of August, that  
 13 I took a Record of Conversation from. Subsequent  
 14 to that, there may have been a couple other phone  
 15 calls. I don't remember the exact number or dates.  
 16 Q And then, I think, you already identified a meeting  
 17 that you had with Mr. Cole in Montreal?  
 18 A Yes, and that was -- I don't remember the exact  
 19 time, but it was probably in October sometime,  
 20 October, November.  
 21 Q And that's 2004, correct?  
 22 A Correct.  
 23 Q We're going to go ahead and mark as Deposition  
 24 Exhibit No. 7 a document that you brought here  
 25 today with you and have represented to us that you

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1 located sometime in the last day or two, from your  
 2 desk.  
 3 And before we mark it, I'll just identify it as  
 4 a Record of Conversation on University of Notre  
 5 Dame Facilities Engineering notepad, dated  
 6 August 18, '04, time 8:30 a.m., with Jeff Cole.

7 A Correct. I would just say it was not from my desk.  
 8 It was from our central files, is where --

9 Q Fair enough.

10 A -- where I found it.

11 (Deposition Exhibit 7 marked for  
 12 identification.)

13 BY MR. SHEEAN:

14 Q I'm handing you what we've marked as Exhibit 7 and,  
 15 sir, let me ask you, is that a -- is that an  
 16 accurate copy of your Record of Conversation you  
 17 produced to us today?

18 A Yes, it is.

19 Q And did you take these notes down contemporaneously  
 20 with your conversation with Mr. Cole?

21 A Yes.

22 Q And is the -- are the notes an accurate reflection  
 23 of your conversation with Mr. Cole, to the best of  
 24 your recollection?

25 A Yes.

1 Q And you kept these notes after you'd made them in  
 2 August of -- 18th, 2004, in keeping with the  
 3 standard document retention policy in place at the  
 4 University of Notre Dame?

5 A I'm not sure I know what our standard document  
 6 retention policy is. I would say that I don't  
 7 frequently write records of conversation, a few  
 8 times a year.

9 This obviously struck me as a time that I chose  
 10 to take some notes. I recalled this conversation.  
 11 I just wasn't aware that I had this written record  
 12 until two days ago.

13 Q Okay. Is it fair to say that this document was  
 14 maintained as a standard business record by the  
 15 university?

16 A Yes.

17 Q Okay. Since it's in your handwriting, I wonder if  
 18 you'd be so kind as to read the body of the Record  
 19 of Conversation.

20 A I'll do my best to read my cryptic, broken,  
 21 left-handed writing here. It says, "Follow-up on  
 22 boiler, concerned that we are considering an "O"  
 23 type. Advised that intellectual property at risk.  
 24 Erie Power rights to be liquidated by end of  
 25 August. Appears that Indeck is in play for rights

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1 and Victory is not. If Indeck obtains rights,  
 2 Victory will no longer be allowed to manufacture  
 3 boilers based on intellectual property. Questions  
 4 investment of Victory and English to business.  
 5 Suggests we be skeptical."

6 I think that's a different thought.

7 "Offers visit and trip to Canada to see their  
 8 operation," and next thought was, "English issues  
 9 as well." I believe I was referring to an LA  
 10 boiler, meaning Los Angeles, "Over-rolled tubes,"  
 11 obviously, was the problem he was referring to.

12 "Rentech BP, meaning Bridge Petroleum, Cherry  
 13 Point," and then it said, in parentheses, "locked  
 14 out."

15 Q Okay. Thank you. I just want to go through that a  
 16 little bit. "Concerned that you were considering  
 17 an "O" type."

18 Did he say anything regarding the "O" type  
 19 design other than the intellectual property  
 20 issue -- concerns that follow, to the best of your  
 21 recollection?

22 A I don't recall that.

23 Q Okay. So --

24 A Unless it was the membrane issue but I -- but I  
 25 don't recall that being unique.

1 Q Well, to the best of your recollection, did anyone  
 2 ever tell you that membrane-wall construction was  
 3 something that was proprietary to Erie Power?

4 A No.

5 Q Okay. The next sentence that you read was "Advise  
 6 that intellectual property at risk. Erie Power  
 7 rights to be liquidated by end of August."

8 Do you recall specifically what he said in that  
 9 regard, beyond what's written there and what I just  
 10 read?

11 A My gist of it is, is just telling me that -- as we  
 12 had found out earlier in August, that, you know,  
 13 Erie Power was in bankruptcy, that it was in the  
 14 process of being sold. He was saying, you know,  
 15 hey, by the end of the month we think this is going  
 16 to be sold, it looks like Indeck may be in a  
 17 position that they're going to buy it and Victory  
 18 wasn't really even in the running, is my  
 19 recollection of the conversation, that they weren't  
 20 either interested or in a position to be bidding  
 21 for the rights.

22 And then he went on to intimate that it would  
 23 seem likely that if Indeck got the rights, there  
 24 might be difficulty for Victory to produce a boiler  
 25 of that type.

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1 Q Did he say why Victory would no longer be allowed  
 2 to manufacture this boiler based on intellectual  
 3 property if Indeck obtained the rights?

4 A Not beyond just that.

5 Q Okay. What did you take from -- well, let me --  
 6 strike that.

7 First of all, you indicated a minute ago it's  
 8 not your standard practice to take down handwritten  
 9 notes of telephonic conversations, correct?

10 A Correct.

11 Q What -- what prompted you to take these notes in  
 12 this instance?

13 A I think at this point we were getting so much bad  
 14 news about every vendor, that if you called and  
 15 talked to me, I wrote a note somewhere, and that  
 16 day I happened to have one of these pads on my  
 17 desk.

18 I also think it was a little disconcerting to  
 19 hear some of this information, and if you really  
 20 look at this, at this point I presume -- I should  
 21 never presume -- Mr. Cole obviously was aware of  
 22 who the short list were because he called me and  
 23 made a comment about each and every one of them,  
 24 all of them in the negative.

25 Q And was that public knowledge, to the best of

1 your -- to the best of your recollection?

2 A I think in their industry they all talk to one  
 3 another.

4 Q But --

5 A It wasn't something we publicly released, no.

6 Q Did you follow up with anyone within the university  
 7 to inquire about this issue of the intellectual  
 8 property rights at risk?

9 A I don't recall that I did.

10 Q How about anyone with Cummins & Barnard or any of  
 11 your outside vendors who were helping you with the  
 12 procurement?

13 A I also don't recall doing that either.

14 Q Well, what, if anything, did you do with this  
 15 information once you had this conversation with  
 16 Mr. Cole, where he told you that if Indeck obtained  
 17 the rights, Victory would no longer be allowed to  
 18 manufacture boilers based on intellectual property?

19 A We shared it internally. I'm sure we shared it  
 20 with Cummins & Barnard. Although, there really  
 21 wasn't anything that I recall asking them to do.

22 At this point in our evaluation, we were  
 23 leaning towards English and NATCOM, and so if that  
 24 was going to be the end decision, it really didn't  
 25 matter to me.

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1 So I think it was just something we -- plus,  
 2 I -- a lot of these times I couldn't judge the  
 3 validity of what everyone was telling me because  
 4 they were telling me a lot of terrible things.

5 If we had been to a point where we discussed  
 6 further with Victory a purchase, we would have  
 7 certainly, in confidence, brought it up with them,  
 8 but we never got to that point.

9 Q Were you concerned that if you went forward with  
 10 Victory, you were going to be getting involved in  
 11 some sort of a litigation matter?

12 A I really didn't think about that, from the  
 13 standpoint that that wasn't our focus at that  
 14 point, where we were going to go. So I didn't have  
 15 to think about it.

16 Q Is it fair to say that Mr. Cole's comment raised  
 17 doubts in your mind about Victory Energy's  
 18 relationship with the intellectual property rights?

19 A I guess what I would say is it was -- it was in  
 20 conflict with what Victory had told us and that  
 21 they had a license agreement, that they were -- had  
 22 shared or were sharing with us at that -- at or  
 23 around that time.

24 And, again, we didn't get to a point where we  
 25 were seriously looking at Victory, that then I

1 would have asked our general counsel to look at  
 2 this. It's certainly not an issue I would have not  
 3 asked for help on.

4 Q Why, as of August 18, 2004, were you leaning more  
 5 toward English Boiler than Victory or Rentech?

6 A Lower costs, higher efficiency, lower emissions.  
 7 Every -- they basically met the criteria that we  
 8 were looking for. They were the evaluated most  
 9 responsive/best bidder, however you want to call  
 10 that.

11 Q Did you go back to Victory after the meeting in the  
 12 first week of August and ask them if they could  
 13 lower the price or lower the emissions or raise the  
 14 efficiency of their boiler?

15 A No. We didn't do that with anyone.

16 Q Do you know whether or not Victory Energy could  
 17 have lowered the price or raised the efficiency or  
 18 lowered the emissions?

19 A I only can -- no, I don't know that.

20 Q The next sort of paragraph in your handwritten  
 21 notes say, "Questions investment of Victory and  
 22 English to business. Suggests we be skeptical;" do  
 23 you see that?

24 A Yes.

25 Q What did you think Mr. Cole meant by that?

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1	boilers at the time you made the decision not to	1	MR. GISLESON: Want to take a
2	select Victory Energy?	2	short break so the witness can
3	MR. GISLESON: Objection,	3	stretch his legs, perhaps get some
4	misleading, foundation, vague.	4	water and then, Chris, you can
5	BY MR. SHEEAN:	5	finish up with anything?
6	Q You can answer.	6	MR. SHEEAN: That's fine.
7	A Help me with that one.	7	MR. HOYE: That's a great idea.
8	I was aware of the situation as Jeff had laid	8	Thank you.
9	it out. I did not really go investigate to see if	9	VIDEOGRAPHER: We're off the
10	what he was telling me was true or not. And,	10	record. The time is 3:08 p.m.
11	again, I think, yes, I was aware, but it wasn't	11	(Short recess taken.)
12	part of my decision process.	12	VIDEOGRAPHER: We're back on
13	Q Did you meet with anyone else from Indeck when you	13	the record. The time is 3:16 p.m.
14	were up at the plant in Montreal?	14	This is tape number 2 in the
15	A Basically one other gentleman who was the plant	15	deposition of Mr. Kempf.
16	manager. I'd have to dig back to find his name,	16	MR. GISLESON: Good --
17	but he was the guy who ran the facility.	17	MR. SHEEAN: Mr. Kempf, I just
18	Q And is that actually the Volcano plant in Montreal?	18	want to say I have no further
19	A I believe you are correct.	19	questions at this time.
20	Q And are those direct-fired package watertube	20	CROSS-EXAMINATION
21	boilers?	21	BY MR. GISLESON:
22	A I believe so. They made a variety of things there.	22	Q Good afternoon. We looked at Exhibit 1, which
23	MR. SHEEAN: I think I'm done.	23	included the instructions to bidders, as well as
24	Let me just go through my notes real	24	the bid specifications for the boiler number 6
25	quick.	25	project; is that right?

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1	A Correct.	1	was ultimately in charge of the process?
2	Q And if you could pick those up, if you don't mind.	2	A I presume so, yes.
3	Looking at page ND43, which is Section 20,	3	Q As the director of utilities, ultimately the
4	"Invitation For Bids," does this basically set	4	decision rested with you as to which boiler to
5	forth the ground rules for how the University of	5	select subject to the advice and opinions that you
6	Notre Dame was going to evaluate the bids that were	6	received from the other members of the team?
7	submitted by the different bidders?	7	A That is correct.
8	A Yes, it does.	8	Q Did VEO, Victory Energy Operations, have a right to
9	MR. SHEEAN: What's the page	9	a contract with the university for the watertube
10	number?	10	package boiler that was being bid as a result of
11	MR. GISLESON: ND43.	11	its having submitted a bid to the university?
12	MR. SHEEAN: Thank you.	12	A No.
13	BY MR. GISLESON:	13	Q And is that basically set forth on page ND43, under
14	Q Under due date, for April 29, 2004, it says that	14	the paragraph "Right to Reject: The purchaser
15	seven copies of the proposal shall be delivered to	15	reserves the right to reject any or all proposals
16	you; is that right?	16	received as a result of this request for proposal
17	A Yes.	17	or parts thereof or items therein. The purchaser
18	Q How many people were involved in the decision	18	reserves the right to enter into an agreement with
19	process for the boiler?	19	whomever it chooses, and the award may be to other
20	A Probably three to four people from our staff and	20	than the low bidder"?
21	I'm going to say a light number from Cummins &	21	A That is correct.
22	Barnard --	22	Q Did English obtain the contract for the watertube
23	Q As --	23	package boiler --
24	A -- had some involvement at some point.	24	A Yes.
25	Q As the director of utilities, were you the one who	25	Q -- on the merits?

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1	A	Yes.	1	A	I do.
2	Q	And when you were identifying lower cost, higher efficiency, and lower emissions, English submitted the proposal that was the best in terms of each of those features?	2	Q	Under alternate number 5, it has, "Furnish all welded tube construction in lieu of rolled construction;" do you see that?
3			3		
4			4		
5			5	A	Yes.
6	A	Yes.	6	Q	What's the difference, as you understand it, between all welded tube construction and rolled construction?
7	Q	Was it your opinion, based on the investigation you did, that the English boiler was in the best interest of the University of Notre Dame?	7		
8			8		
9			9	A	I think that's how the tubes are attached to the drum.
10	A	Yes.	10	Q	Is rolled construction different than all welded tube construction?
11	Q	And is that still your opinion?	11		
12	A	Yes.	12		
13	Q	If we look at Exhibit 2, which is the proposal that Victory Energy Operations submitted to the university, did you personally read the proposal cover to cover, page for page?	13	A	Yes.
14			14	Q	Were there some bidders who submitted bids that utilized rolled construction instead of an all welded tube construction?
15			15		
16			16		
17	A	I went through all these proposals in fairly decent detail. I won't swear to having read every word.	17	A	I believe there may have been.
18			18	Q	You were asked some questions about welded-wall construction.
19	Q	Was the bid that Victory submitted higher in terms of dollars, a higher cost --	19		
20			20		
21	A	Yes.	21		
22	Q	-- than the English proposal?	22	A	Talking about membrane construction?
23	A	Yes.	23	Q	Correct.
24	Q	On page ND212, they have a series of mandatory alternates; do you see that?	24	A	I think parts of their boilers may not have been a hundred percent membrane construction.
25			25		

		Page 79	Page 80		
1	Q	Are you familiar with the concept of a tangent-tube construction in watertube boilers?	1	A	All I really was aware of is that they had -- as they had told us, that they held a license to use the Erie design.
2			2		
3	A	I've heard it, but I won't claim to fully understand it.	3		
4			4	BY MR. GISLESON:	
5	Q	Do you know whether any of the boilers currently in use at the university have a tangent-tube design?	5	Q	When did Victory first tell the university that it held a license to use the Keystone design?
6			6		
7	A	You know, I'm not certain of that.	7	A	Without reading the proposal, to see if they said it here, I know for certain it was made aware to us when we had the interview process. I may have known it before then, but I'm not certain.
8	Q	Are there any of the boilers currently in use at the university that do not have an all-membrane design?	8		
9			9		
10	A	I actually think all of them are not all-membrane design.	10		
11	Q	And those boilers are still performing adequately for the university?	11	Q	During the interview that occurred in August 2004, did you ask any specific questions as to the role, if any, that Erie Power Technologies would have if Victory was awarded a contract for boiler number 6?
12			12		
13	A	Yes.	13	A	I believe we asked some questions directly to the gentleman from Erie.
14	Q	And the university is able to utilize those boilers to generate steam, even though they do not have an all welded wall design?	14	Q	Bob Gdaniec?
15			15	A	Yes.
16			16	Q	What did Mr. Gdaniec say?
17			17	A	I think it was basically to explain, my recollection, that Erie had a collection of designs and all the design work it had done for an "O" type design and then what they did was helping the licensees in tailoring, for lack of a better word, the specific design into an "O" design. So they
18			18		
19	A	Correct.	19		
20	Q	From reviewing this initial proposal that Victory submitted to the university in May 2004, were you able to determine whether Victory owned the technology that was the subject of its proposed Keystone boiler?	20		
21			21		
22			22		
23			23		
24			24		
25		MR. SHEEAN: Objection, vague.	25		

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1	were a part of that engineering process.	1	this says "O" type boiler specifications and then a
2	I know he discussed that, you know, they	2	general description of the Keystone design.
3	obviously didn't fabricate anything or manufacture	3	Did you agree, generally speaking, with the
4	anything. That was all stuff that Victory would	4	description of the benefits that are identified on
5	have done.	5	this page for the Keystone design?
6	Q You said that the "O" design was a well-known,	6	A I generally took the benefits, as people gave them
7	long-term design with a long history. Are you	7	to us, at their word. I wouldn't say I researched
8	referring to the Keystone?	8	them to any great length.
9	A Yes.	9	Q Turning to page ND276, which is the first page of a
10	Q Is one of the boilers that the university currently	10	"Victory Energy Keystone Steam-Generating Systems"
11	has a boiler that was manufactured by Erie City	11	brochure, do you recall whether you read the
12	Ironworks?	12	brochure that Victory submitted?
13	A I believe it is. I think our number 1 boiler is an	13	A I don't recall reading that. It's -- when I had
14	Erie City "O" -- "O" type boiler.	14	six or seven of these to read, it's very likely I
15	Q And has that performed well for the university over	15	didn't read that in any great detail.
16	time?	16	Q Looking at page ND283, under "Keystone Wall
17	A Yes, it has.	17	Construction," it says, "Victory Energy's design,
18	Q Have you developed an understanding that the	18	engineering, and manufacturing advances offer a
19	Keystone name is well known in the industry for "O"	19	complete range of wall construction technology."
20	type boilers?	20	During the meeting in August 2004 at Notre
21	A It was presented to us that way, yes.	21	Dame, did Victory identify any advances that it had
22	Q Presented to you by whom?	22	developed in the design, engineering, and
23	A By Victory.	23	manufacturing of watertube boilers or
24	Q Looking at the Victory proposal, at page ND220,	24	wall-construction technology for watertube
25	which is a page that you looked at with Mr. Sheean,	25	boilers?

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1	A I don't --		1	never designed and manufactured a boiler above a
2	MR. SHEEAN: Objection, vague.		2	hundred thousand pounds per hour as of the time
3	A I don't specifically recall.		3	that it submitted the proposal to the university?
4	BY MR. GISLESON:		4	A I wouldn't say it was a surprise, but it was
5	Q Turning to page ND292, which is a list of package		5	certainly a point of concern.
6	boilers, selected references, did Victory make any		6	Q Why was it a point of concern?
7	representations to you or, to your knowledge,		7	A One of our early issues was to try to find a
8	anyone else associated with this project, as to		8	manufacturer that had experience in the boiler we
9	which of these boilers Victory itself had been		9	were -- were trying to buy, both in size and type.
10	involved in the manufacture?		10	Q Had you heard of horror experiences in the industry
11	A No, I don't believe so.		11	of a manufacturer who got in over its head?
12	Q Was it your belief, from seeing a list of		12	MR. SHEEAN: Objection, vague.
13	references supplied by Victory, that Victory itself		13	A I don't know that we heard of them in quite that
14	had been involved with the design and manufacture		14	context. We heard a lot of different things but
15	of those boilers?		15	not so much that they got in over their head. I
16	MR. SHEEAN: I'm going to		16	think that was just a concern of our own.
17	object to the extent it		17	In reality, we found out that there was a lot
18	mischaracterizes prior testimony,		18	of people that didn't have a lot of experience.
19	but you can answer.		19	BY MR. GISLESON:
20	A I don't recall at what point but I -- I do recall		20	Q The university ultimately decided that it wanted a
21	that at some point there was a realization on my		21	NATCOM burner in the boiler it ultimately selected;
22	part that possibly they hadn't actually		22	is that right?
23	manufactured all of these.		23	A Yes.
24	BY MR. GISLESON:		24	Q What was it about the NATCOM burner?
25	Q Did it come as a surprise to you that Victory had		25	A They were able to guarantee lower NOx emissions on

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1	both natural gas and No. 2 fuel oil firing.	1 construction.
2 Q	Did that become a condition, in the university's view, of any successful bidder, that it utilize a NATCOM burner?	2 Do you recall any of the three finalists identifying any shortcomings associated with all 3 welded tube construction?
5 A	We realized that their guarantees were significantly lower than their competition, and we felt that we needed that boiler to achieve the limits that we were having to propose to the state or at least to get ourselves enough margin for our own safety for ongoing operations.	5 A We're moving, again, into an area that I'm not the expert on, but I think we may have started out this 6 process looking at welded tube and eventually 7 ending back up with rolled tube, but I'd have to 8 verify that.
11 Q	Was Victory Energy able to provide a package watertube boiler that utilized a NATCOM burner?	10 So there was some -- my recollection, at least, 11 was there was contention amongst the manufacturers 12 as to what was better.
13 A	They had told us that they could not or would -- more specifically, they would not.	13 Q It was still an open issue as to which was better, 14 rolled tube versus welded tube?
15 Q	Was that an important factor to you in your decision to go with the English boiler?	15 A Correct.
17 A	It was a factor, that we felt that NATCOM was our best opportunity to meet the compliance needs that we had.	16 Q You were asked questions about whether welded-wall 17 technology is proprietary to a certain manufacturer.
20 Q	In the July 21, 2004 letter from Cummins & Barred (sic), to Ed Hull of Power Systems, in which he identified Victory Energy as one of the three boiler manufacturers that had been short-listed, there was a bullet point -- bullet point on there for benefit/shortcomings of all welded tube	19 Did you ever get into an analysis at any point 20 during this process as to what technology was or 21 was not proprietary to a particular manufacturer?
25		22 A No.
		23 Q Did you ever get to the point where you were 24 looking at detailed design drawings for the kind of 25 wall construction that was to be used, to determine

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1	whether a particular manufacturer considered its specific design for wall technology to be proprietary?	1 overview of the company and general discussion of 2 their boiler design."
4 A	No.	3 Does that help in any way in identifying who on 4 behalf of Victory stated that although Victory has 5 not manufactured a boiler in the size required for 6 this project, however, they can easily scale up 7 their "O" style design?
5	I should correct. The only -- understand 6 proprietary. There was that discussion about the 7 "S" type boiler, but that didn't relate to, you 8 know, membrane-wall construction or the tube, and 9 that was generally accepted by all, that they had a 10 patent. We didn't investigate it.	8 A I can't say absolutely. I don't recall who said 9 that.
11 Q	Looking at Exhibit 5, which was the July 21, 2004 Cummins & Barnard letter, with the meeting minutes attached to it, under the section for Victory Energy Operations, paragraph 3, which is at page ND333, it says, "As 'Victory Energy' they have not manufactured a boiler in the size required for this project, however they can easily scale up their 'O' style design for this project, utilizing a proven Keystone design."	10 Q Do you have an understanding as to what was meant 11 by the statement from the Victory representative 12 that Victory can easily scale up their "O" style 13 design?
12	Who was speaking from Victory on that point?	14 A I think I do.
13 A	I -- I don't recall specifically who would have said that.	15 Q And what's that understanding?
14 Q	If we look at the previous page under "Victory Energy Discussion," it says, "Introductions were held and John Viskup of Victory provided an	16 A Just that it's -- it's the same as the smaller one, only bigger, and that was --
15		18 Q They can use their existing technology, to which 19 they have access, to design and manufacture a 20 larger boiler?
16 A		21 A Correct.
17 Q		22 Q Did anyone from Victory during that meeting 23 identify any limitations to their abilities or 24 technology to scale up their existing technology to 25 design and manufacture a 180,000-pound per hour

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1	watertube boiler?	1	could be developed or obtained through the English
2	A I don't recall any.	2	boiler?
3	Q And if we look in the same meeting minutes on	3	A No.
4	paragraph 13, same page, ND333, it reads, "In	4	MR. GISLESON: Mark this as an
5	regards to supplying a NATCOM burner, Victory	5	exhibit, please.
6	stated that they cannot do this due to NATCOM's	6	(Deposition Exhibit 8 marked for
7	affiliation with Nebraska Boiler;" do you see that?	7	identification.)
8	A I do.	8	BY MR. GISLESON:
9	Q And did you understand that to be an unequivocal,	9	Q I'd like to show you what's been marked as
10	unconditional statement by Victory?	10	Exhibit 8, which is a two-page letter stamped ND355
11	MR. SHEEAN: Objection, vague.	11	to 356.
12	A Pretty much. I'd have to clarify that for you a	12	Do you recognize this as a true and correct
13	little bit but, yeah, pretty much.	13	copy of an August 20, 2004 letter, that you
14	BY MR. GISLESON:	14	received from Christopher T. Sheean of the Law Firm
15	Q Did they ever come back thereafter and say, hey, we	15	Kelley Drye & Warren?
16	changed our mind, we'll supply a NATCOM burner?	16	A I do.
17	A I think what happened ongoing is everybody was	17	Q Did you review the letter when you received it?
18	looking at also the other alternate. We didn't say	18	A I did.
19	we wanted a NATCOM burner. We said we wanted	19	Q Now, you mentioned before that you had had a
20	certain emission levels.	20	conversation with Jeff Cole on August 18, 2004,
21	Coen, for example, still had the opportunity to	21	concerning the license that Victory had; is that
22	meet that. So I'm sure Victory probably was still	22	correct?
23	working with them.	23	A Yes.
24	Q Did they ever come back and to your satisfaction	24	Q So that the letter you received from Mr. Sheean
25	demonstrate that they can exceed the emissions that	25	came after the conversation you had with Mr. Cole;

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1	is that right?	1	further investigation because at the point you had
2	A That is correct.	2	the conversation with Jeff Cole and then you
3	Q And Mr. Sheean writes, "This firm represents	3	received the letter from Victory's lawyer, the
4	Victory Energy Operations, and we've been asked to	4	university already planned to award the contract to
5	comment on the status of Victory Energy's license	5	English Boiler?
6	agreement with Erie Power & Technology,	6	A That's a little overreaching. I think we were
7	Incorporated. Victory Energy's license should	7	intending to pursue negotiation with them, and
8	remain in place following the sale of EPTI's assets	8	Victory at that point was our back-up plan, for
9	for two reasons," and then he identifies two	9	lack of a better term.
10	reasons in his letter; do you see that?	10	Q And it was never necessary to pursue the back-up
11	A I do.	11	plan because you reached agreement with English
12	Q Now, after you received this letter, did you do any	12	Boiler?
13	follow-up investigation or research of any kind on	13	A That's correct.
14	this issue of whether Victory would retain the	14	Q Did you consider English Boiler to have
15	right to use the Keystone technology if the Erie	15	significantly less experience than Victory Energy
16	Power assets were sold?	16	Operations?
17	A I did not.	17	A No.
18	Q Did this letter satisfy any concerns you may have	18	Q Did you consider English Boiler to offer a product
19	had at the time?	19	with an inferior history in sales record to the
20	A It did for the reasons I stated earlier, that we	20	Victory product?
21	weren't necessarily pursuing a purchase from	21	A No.
22	Victory, but at that point it was something to put	22	Q Now, you were shown a Record of Conversation that
23	in the file, and if we had swung in that direction,	23	you had with Jeff Cole on August 18, 2004.
24	I'd have gone back to this issue.	24	Is it correct that during that conversation
25	Q From your perspective, there was no need to do any	25	Mr. Cole discussed with you not just the Victory

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1 proposal but also the Rentech proposal and the  
 2 English Boiler proposal?  
 3 A That is correct.  
 4 Q Based on your experience in dealing with the  
 5 different manufacturers who were supplying  
 6 proposals to the university, were they all from  
 7 time to time commenting on the proposals submitted  
 8 by their competitors?  
 9 A Many of them were.  
 10 Q As a result of -- strike that.  
 11 And was it true that prior to the conversation  
 12 on August 18, 2004, with Mr. Cole, you had had  
 13 conversations with other manufacturers in which  
 14 they expressed their opinions concerning their  
 15 competitors?  
 16 A Yes.  
 17 Q As a result of those experiences, was it your  
 18 belief that you had to form your own independent  
 19 judgment as to anything you were told by one of the  
 20 manufacturers submitting a bid?  
 21 A It -- that's partially true. It's just that we had  
 22 to validate their claims and not just take them at  
 23 their face.  
 24 Q Did you take any of the claims that Mr. Cole made  
 25 during the August 18, 2004 conversation at their

1 face?  
 2 A Again, they weren't essential to the direction we  
 3 were currently heading; and if we had headed  
 4 another direction, I would have certainly taken  
 5 them with a different level of sincerity.  
 6 Q So you had the conversation, you put it in a file,  
 7 but you moved on and just focused on the English  
 8 boiler?  
 9 A Correct.  
 10 Q And I believe you advised counsel for Victory that  
 11 you don't recall which specific Indeck entity  
 12 employed Mr. Cole; is that right?  
 13 A I don't. I know we have it in our records. I'd  
 14 have to look it up for you.  
 15 Q Do you know during that conversation who first  
 16 raised the issue of Indeck's acquisition of the  
 17 Keystone assets, whether it was you or whether it  
 18 was Mr. Cole?  
 19 A It was Mr. Cole. I had no reason to call him. So  
 20 he called me, and those were the items he wished to  
 21 discuss.  
 22 Q Can you recall anything else that Mr. Cole said to  
 23 you during that conversation, other than what you  
 24 wrote down in Exhibit 7?  
 25 A No.

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1 Q You said that not everyone could meet Notre Dame's  
 2 desire for a hundred percent membrane construction.  
 3 Do you recall what alternatives were provided  
 4 to the membrane construction?  
 5 A I'm trying to remember, but it seems like at least  
 6 one of the bidders had like a front wall refractory  
 7 design, and they basically downplayed that as not  
 8 being as big an issue, and we certainly listened  
 9 and considered that.  
 10 Q Any other alternatives that you recall?  
 11 A No, I don't.  
 12 Q Approximately how many proposals did you receive?  
 13 A I believe we received six.  
 14 Q From your review of those six proposals, did each  
 15 of the manufacturers recommend a different design?  
 16 MR. SHEEAN: Objection, vague.  
 17 A Talking about boiler type?  
 18 BY MR. GISLESON:  
 19 Q Correct.  
 20 A Mostly "D"s. I think one "O" and the "S."  
 21 Q Was it clear to you that there were different  
 22 alternative approaches that the university could  
 23 pursue for a boiler?  
 24 A Yes. We were aware of that even before we took  
 25 bids.

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1 Q There is no one-size-fits-all in the industry?  
 2 A Correct.  
 3 Q And I think you said that the boiler that you  
 4 wanted was not an off-the-shelf item?  
 5 A Correct.  
 6 Q What did you mean by that?  
 7 A That it's a customized product, that you don't  
 8 order it by a part number and, you know, get -- you  
 9 know, here's the way it comes and you just decide  
 10 that's what you want. It's not like buying a  
 11 furnace at home.  
 12 MR. GISLESON: Those are the  
 13 questions I have. Thank you.  
 14 THE WITNESS: You're welcome.  
 15 MR. SHEEAN: I just have a  
 16 couple of quick follow-up questions  
 17 for you, Mr. Kempf.

18 REDIRECT EXAMINATION  
 19 BY MR. SHEEAN:  
 20 Q You talked about the existing boilers that the  
 21 university currently has on line and the fact that  
 22 some of those or many of those are not 100 percent  
 23 membrane wall, correct?  
 24 A Correct.  
 25 Q And the fact that those boilers are still in